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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 146

JOSEPH CHOBOT,
Appellant

vs.

STATE OF WISCONSIN,
Appellee

On Appeal From the Supreme Court, State of Wisconsin

REPLY

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Synopsis of Argument

A. The application of an obscenity law does not constitute solely a "question of fact", and if the constitutional safeguards of speech and press are to be subordinated to the determination of a judge or a jury by the gloss of "issue of fact", then the fundamental constitutional protections are seriously undermined 1, 2

B. If any material other than "hard-core pornography" as at least limited by Judge Fuld in *People v. Richmond County News, Inc.* is to be suppressed by any state, the constitutional guarantee of free press will be considerably weakened 2

C. The trial court erred in disregarding the exhibits introduced by appellant as constituting community standards giving as a reason that such material went beyond the particular community concerned in this case 3

The trial juudge is not the exclusive judge of what the common conscience of the community is, and such determination is clearly constitutional error 3

D. It is arbitrary and capricious to infer knowledge of obscenity when the lower courts and the prosecution were unable to agree that nine out of thirteen magazines introduced by the State appealed to prurient interest and went substantially beyond the customary limits of candor, applying the standards of the community 3

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The State argues (Appellee's Brief, pp. 3-4) that the Wisconsin courts simply decided a "question of fact" and that Mr. Justice Harlan was alone in stating that each application of an obscenity law to a writing involves a "constitutional judgment".

However, since *Roth vs. United States,* (1957) 354 U.S. 476, this Court has shown its support of the view taken by Justice Harlan on this issue. *Mounce vs. United States,* (1957) 355 U.S. 180; *One vs. Olesen,* (1957) 355

U.S. 371; *Sunshine Book vs. Summerfield,* (1957) 355 U.S. 372; *Times Film Corp. vs. City of Chicago,* (1957) 355 U.S. 35; *Kingsley Pictures Corp. vs. Regents,* (1959) 360 U.S. 684.

If the constitutional safeguards of free speech and press are so frail as to be subordinated to the determination of one judge or a jury by the gloss of "issue of fact", then the fundamental protections of speech and press are indeed seriously undermined, and there is a necessity for this Court to speak out and clarify the question.

The State has sought to argue away *People v. Richmond County News, Inc.*, unreported, — — N.Y. — —, — — N.E. 2nd — —, (Appellant's Brief, pp. 39-61), by asserting that community standards of New York and Wisconsin are different and by asserting that the elements of "depravity" in the respective magazines are different (P. 4, Appellee's Brief). This argument entirely misses the point. The point of *People vs. Richmond County News, Inc.* (supra) is that if any material other than "hard-core pornography" as at least limited by Judge Fuld in the New York Opinion (Appellant's Brief, pp. 39-51) is to be suppressed by *any* state, how can we reconcile such suppression with the free press guaranties of the Constitution.

Neither *Roth* nor the cases following *Roth* intimate that the constitutional protection does not apply to the entertaining and amusing, as well as to the informative. If obscenity laws may be arbitrarily applied beyond "hard-core pornography", the Supreme Court should be heard from.

The State's discussion of "contemporary community standards" and the trial judge's role therein seems clearly fallacious (Appellee's Brief, p. 6).

Appellant introduced books and magazines freely and substantially sold and delivered in the Milwaukee County area, (R. 119, 120, 121, 122, 125, 126) (See, too, Exhibits 14-26), as material which constituted community standards. The trial court held that the material went beyond the community concerned in this case and disregarded appellant's exhibits. But that is no reason for disregarding such material "as beyond the community concerned in this case", (Appellee's Brief, p. 6).

The State argues that the trial judge really decides the question by his own notion of what the community standards are, echoing the Wisconsin Supreme Court's language, "exclusive judge of what the common conscience of the community is," (Appellant's Brief, p. 23), and that is clearly constitutional error.

With respect to scienter, the State has failed to distinguish *Smith vs. California,* (1959) 361 U.S. 147. In the instant case, the lower courts themselves, after examining thirteen magazines submitted by the prosecution as obscene, all containing many pictures of nudity, found that nine of the magazines "did not appeal to prurient interest and go substantially beyond the customary limits of candor applying the standards of the community", but that four did. Is this due process? Can the circulation of a free press be unimpeded if standards like these prevail? We think not, and respectfully submit that the State's Motion to Dismiss Appeal be denied.

Respectfully submitted,

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